

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling Regarding)	WC Docket No. 05-283
Self-Certification of IP-Originated Traffic)	

**COMMENTS
of the
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
ORGANIZATION FOR THE PROMOTION; AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES;
UNITED STATES TELECOM ASSOCIATION; and the
WESTERN TELECOMMUNICATIONS ALLIANCE**

The Independent Telephone and Telecommunications Alliance (ITTA),¹ the National Exchange Carrier Association, Inc. (NECA),² the National Telecommunications Cooperative Association (NTCA),³ the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),⁴ the United States Telecom

¹ ITTA is an organization of midsize incumbent local exchange carriers (“ILECs”) that collectively serve over ten million access lines in over 40 states and offer a diversified range of services to their customers. Most ITTA member companies qualify as rural telephone companies within the meaning of Section 3(37) of the Communications Act of 1934, as amended (the “Act”). 47 U.S.C. § 153(37).

² NECA is a non-stock, non-profit association formed in 1983 pursuant to the Commission’s Part 69 access charge rules. *See generally* 47 C.F.R. § 69.600 *et seq.* NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of over 1200 incumbent local exchange carriers (ILECs) that choose to participate in these arrangements.

³ NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a “rural telephone company” as defined in the Act.

⁴ OPASTCO is a national trade association representing over 560 small ILECs serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over 3.5 million customers. All OPASTCO members are rural telephone companies as defined in the Act.

Association (USTelecom);⁵ and the Western Telecommunications Alliance (WTA)⁶ (jointly, the “Associations”) hereby file comments on the Petition for Declaratory Ruling of Grande Communications, Inc. (Grande).⁷

I. INTRODUCTION

Grande asks the Commission to declare when an access customer certifies to a LEC that its traffic is “enhanced services, VoIP-originated traffic” the LEC may rely on that certification and treat the customer’s traffic as local for routing and intercarrier compensation purposes.⁸ Grande further asks the Commission to declare that other interconnected LECs are also to treat such traffic as local for intercarrier compensation purposes, and may not assess access charges against such Certified Traffic.⁹

The Associations urge the Commission to deny Grande’s *Petition* as premature and unwarranted. Questions related to the comprehensive regulatory treatment of VoIP-originated traffic, including the extent to which access charges and universal service contribution obligations apply to such traffic, are currently before the Commission in the context of its *IP-Enabled Services* and *Inter-carrier Compensation* rulemaking

⁵ USTelecom represents over 1200 communications service providers and suppliers for the telecom industry. USTelecom’s carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

⁶ WTA is a trade association that was formed by the merger of the Western Rural Telephone Association and the Rocky Mountain Telecommunications Association. It represents approximately 250 rural telephone companies operating west of the Mississippi River.

⁷ Petition for Declaratory Ruling of Grande Communications, Inc., WC Docket No. 05-283 (Oct. 3, 2005) (*Petition*).

⁸ *Id.* at 9.

⁹ *Id.*

proceedings.¹⁰ By asking the Commission to establish a procedure under which LECs would be required to treat VoIP-originated traffic as enhanced, regardless of the actual nature of the service offered, Grande improperly seeks to pre-judge the outcome of those proceedings. Furthermore, as explained below, permitting carriers to “certify” that VoIP traffic is somehow exempt from access charges and universal service contributions runs counter to established Commission and industry billing practices and will only invite fraud and abuse. For these reasons the Commission should deny Grande’s petition and resolve issues associated with the comprehensive regulatory treatment of VoIP-originated traffic in the context of established rulemaking proceedings.

II. DISCUSSION

Grande asserts that because Certified Traffic originates in IP format at the calling party’s premises and terminates on the public switched network in circuit-switched format it automatically undergoes a “net protocol conversion” under the Commission’s Computer II rulings and therefore constitutes enhanced service traffic exempt from access charges.¹¹ But Grande also concedes, as it must, that the Commission has not yet issued definitive conclusions regarding the regulatory status of all IP telephony services.¹² Grande’s petition thus improperly and prematurely asks the Commission to establish, by way of declaratory ruling, a rule that it has so far declined to adopt in any of the relevant proceedings in which this issue is under consideration.

¹⁰ See IP-Enabled Services, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004)(IP-Enabled Services NPRM); Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685 (2005); Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001) (*ICC NPRM*).

¹¹ *Petition* at i.

¹² *Id.* at 6, 14.

The Associations strongly believe that, to the extent that the VoIP services are the functional equivalent of traditional voice telephone services and impose the same costs on the network as those services, they should be subject to access charges and universal service contribution obligations. As the Commission stated in its IP-Enabled Services NPRM,

. . . any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.¹³

Similarly, the Commission has explained the ESP exemption does not apply where a service provider “uses the LEC facilities as an element in an end-to-end long distance call.”¹⁴ It was on the basis of this statement that the Eighth Circuit upheld the exemption against a claim that it unlawfully discriminates among service providers.¹⁵ According to the court, the FCC’s decision to exempt information service providers from interstate access charges was reasonable because “such decision did not discriminate in favor of ISPs, which do not utilize LEC services and facilities in same way or for same purposes as other customers who are assessed per-minute interstate access charges”¹⁶ From all appearances, the calls referenced in Grande’s petition are voice calls which do, in fact, “utilize LEC services and facilities in same way (and) for same purposes as other customers who are assessed per-minute interstate access charges.”¹⁷

¹³ IP-Enabled Services NPRM, 19 FCC Rcd 4885, 4904 at ¶ 33, 61.

¹⁴ Brief for Respondents the Federal Communications Commission and the U.S. at 75-76, *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618 (8th Cir. Dec. 16, 1997) (“FCC 8th Cir. Br.”).

¹⁵ *Southwestern Bell Tel Co. v FCC*, 153 F.3d 523 (8th Cir. 1998)

¹⁶ *Id.* at 542.

¹⁷ *Id.*

In support of its assertion that its VoIP services are exempt from access charges, Grande partially quotes a statement from the Commission's 2001 *Notice of Proposed Rulemaking* in CC Docket No.01-92. There, according to Grande, the Commission stated that "IP telephony [is] generally exempt from access charges . . ."¹⁸ Grande fails to mention, however, that the Commission's discussion of the issue in that proceeding was merely background to the overall question of how to develop a unified intercarrier compensation regime, and in any event was limited by its terms to calls handled by "ISPs." This only begs the question as to whether such services may in fact be properly classified as telecommunications services when offered in other service configurations by entities that function as common carriers offering basic telecommunications services.

This is particularly a concern in Grande's case, as it appears based on statements in Grande's petition that it sends the traffic at issue over local interconnection trunk groups mixed in with other local traffic. Grande also claims it forwards all signaling information that it receives, including the calling party number data (CPN).¹⁹ Thus, the traffic at issue appears to be transmitted and terminated in the same fashion, using the same circuit-switched access network and incurring the same costs, as any other traffic.

In any event, the Commission should not adopt self-certification as a means of identifying such traffic.²⁰ As a general matter, intercarrier billing to the extent possible should be based on call detail records collected from switch data recordings.²¹ Permitting

¹⁸ *Petition* at 15, citing *ICC NPRM*.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 19.

²¹ The Alliance for Telecommunications Industry Solutions' Ordering and Billing Forum (OBF) has established industry guidelines for the creation of a standardized, mechanized individual call detail record, called Category 11-01-XX Records. Most carriers now utilize Category 11-01-XX Records, or the

interconnecting carriers to avoid payment of access charges simply by certifying particular traffic only invites fraud and abuse. As a recent petition filed by SBC makes plain, it is becoming increasingly difficult to collect access charges from carriers improperly claiming traffic to be “enhanced.”²² Recent filings before the Commission also illustrate problems associated with “phantom traffic” (i.e., telecommunications traffic that lacks sufficient detail for purposes of rendering bills).²³ Efforts to deal with these problems via technical solutions and reasonable enforcement rules and procedures would be undermined completely were the Commission to declare, as Grande requests, that all a service provider need do is certify that particular traffic in the service provider’s opinion is “enhanced.”²⁴

Finally, grant of Grande’s *Petition* would have serious negative consequences not only for LECs but also for their customers and the public interest. With respect to the access charge regime, creation of a broad access charge exemption for all VoIP calls would create a regulatory incentive to shift voice telephone traffic to an IP platform, however unjustified this may be from a pure marketplace perspective, only to avoid the payment of access charges. This regulatory distortion of the market, in turn, would likely cause a further decline in access minutes of use (“MOU”) even though the LECs’ exchange plant would still be used to terminate calls. Any decrease in access MOUs for

Exchange-Specific Category 11-01-XX Records, to ensure proper identification of calls for intercarrier billing purposes.

²² See Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276 (Sept. 21, 2005) (*SBC Petition*).

²³ See e.g., Letter from Karen Brinkman, Latham & Watkins, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (attaching the Midsize Carrier Coalition’s proposed rules for proper identification and routing of telecommunications traffic.)

²⁴ *SBC Petition* at 18.

carriers operating under rate-of-return regulation would tend to drive up access rates for remaining customers and increase non-marketplace incentives to switch to VoIP technology.

The Commission has recognized that “any discrepancy in regulatory treatment between similar types of traffic or similar categories of parties is likely to create opportunities for regulatory arbitrage” where “parties will revise or rearrange their transactions to exploit a more advantageous regulatory treatment.”²⁵ However, “IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges.”²⁶ As the Commission is also aware, access revenues are crucial to the operation of rural LECs. If those revenues were to be diminished significantly, many rural LECs would be simply unable to continue investing in their networks to further deploy advanced services while some may no longer be able to furnish affordable telephone service to their customers.²⁷ Grande’s plan for access charge-free long distance calls based simply on customer self-certification would further erode confidence in the Commission’s intercarrier compensation system and place additional strains on the currently stretched Universal Service Fund. Its petition must, therefore, be denied.

III. CONCLUSION

The Commission should deny Grande’s *Petition* as premature and unwarranted. The comprehensive regulatory treatment of VoIP-originated traffic is before the

²⁵ *ICC NPRM* at ¶ 12.

²⁶ *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7469, at ¶ 18 (2004).

²⁷ *Comments of the National Exchange Carrier Association, Inc., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (May 23, 2005) at 4.

Commission in the context of its IP-Enabled Services proceeding. Issues relating to intercarrier compensation and universal service contribution obligations for such traffic are likewise before the Commission in other related proceedings. The Commission should not pre-judge the outcome of those proceedings by issuing the requested declaratory ruling, particularly where, as here, Grande has presented no evidence that its “Certified Traffic” actually qualifies as enhanced service or information service traffic under the limited ESP exemption. In any event, customer self-certification is an unacceptable means to determine the nature and jurisdiction of such traffic.

Rather than risk creating additional opportunities for regulatory arbitrage, if not regulatory chaos, by issuing the requested declaratory ruling, the Commission should focus its energies on resolving fundamental questions of how IP-enabled services should be treated for intercarrier compensation and universal service contribution purposes in ongoing proceedings specifically initiated for these purposes.

Respectfully submitted,

December 12, 2005

INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE

By: /s/ David W. Zesiger
David W. Zesiger
Executive Director
1300 Connecticut Ave., NW Suite
600
Washington, DC 20036
(202) 355-1388

NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC.

By: /s/ Richard A. Askoff
Richard A. Askoff
Its Attorney
80 South Jefferson Road
Whippany, New Jersey 07981
(973) 884-8000

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ Daniel Mitchell
Daniel Mitchell
Jill Canfield
Its Attorneys
4121 Wilson Boulevard
10th Floor
Arlington, VA 22203
(703) 351-2000

ORGANIZATION FOR THE PROMOTION
AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES

By: /s/ Stuart Polikoff
Stuart Polikoff
Director of Government Relations

Stephen Pastorkovich
Business Development Director/
Senior Policy Analyst

21 Dupont Circle NW
Suite 700
Washington, DC 20036
(202) 659-5990

UNITED STATES TELECOM
ASSOCIATION

By: /s/ James W. Olson

James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
Robin E. Tuttle

607 14th Street, N.W. Suite 400
Washington, DC 20005-2164
(202) 326-7300

WESTERN TELECOMMUNICATIONS
ALLIANCE

By: /s/ Gerry Duffy

Gerry Duffy
Counsel for WTA
317 Massachusetts Ave. N.E.,
Suite 300 C
Washington, DC 20002
(202) 548-0202

CERTIFICATE OF SERVICE

I hereby certify that a copy the Associations' Comments was served this 12th day of December 2005, by electronic filing and e-mail to the persons listed below.

By: /s/ Elizabeth R. Newson
Elizabeth R. Newson

The following parties were served:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC. 20554*

Jennifer McKee
Federal Communications Commission
Wireline Competition Bureau
PPD
445 12th Street, SW
Washington, DC 20554
Jennifer.McKee@fcc.gov

Best Copy and Printing, Inc.
Room CY-B402
445 12th Street, SW
Washington, DC 20554
fcc@bcpiweb.com

*Filed via ECFS